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27 October 2003

Corbin R. Davis, Clerk of the Court
Supreme Court of Michigan
925 W. Ottawa – 4th Floor
PO Box 30052
Lansing MI 48909

RE: 2002-29 – Proposed Michigan Standards for Imposing Lawyer Sanctions

Introduction:
I believe that the purposes stated in Section A, 1.3, "fairness, predictability and continuity" will not be achieved unless we formally establish the link between MCR 2.114 and MRPC 3.1 - 3.3.

Problem:
I see three problems with the current disconnected process:
1) Whether any lawyer is ultimately found to be in violation of MCR 2.114 or not, the litigants on both sides of the isle ultimately bear the cost of ensuring lawyer compliance with disciplinary rules. This is a greater expense now that sanction orders against lawyers may be appealed of right.
2) If a court orders a lawyer to pay a sanction before the case is fully resolved on its merits, the court creates a direct economic conflict of interest between the lawyer and the client.
3) Judicial opinion about what conduct violates MCR 2.114 goes from the extreme of implementing a loser pays rule to the opposite extreme of accepting anything short of perjury or abuse of process.

Suggestions:
I propose the following changes:
1) Amend MCR 2.114 (E) as follows:
"If a document is signed in violation of this rule ... the court shall impose upon the person who signed it ... an appropriate sanction, ~~which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees.~~ Prior to entry of the final judgment or order, appropriate sanctions may include orders necessary to provide for an expedient, fair and honest resolution of the genuine issues at bar, but may not include an order

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to pay to the other party or parties an amount of money. In addition, if a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, may (or shall?), after entry of the final judgment or order impose on the person who signed it an appropriate sanction in the form of an order to pay to the other party or parties the amount of the reasonable expenses including reasonable attorney fees incurred because of the filing of the document."

2) Amend MCR 2.114 by adding:
(G) "When a court finds a lawyer in violation of this rule, the court shall forward a copy of its order to the Attorney Grievance Commission as required by MRPC 8.3. The order finding that a lawyer has engaged in a violation of this rule must include the court's findings of facts relevant to alleged violation and the court's conclusions of law sufficient to enable review by the Attorney Grievance commission."

3) Amend MCR 2.625 (A)(2) as follows:
"~~In an action filed on or after October 1, 1986,~~ If the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded in the final judgment or order or in a post judgment order as provided by MCL 600.2591~~; MSA 27A.2591~~."

4) Amend MCR 7.202(7)(a)(iv) as follows:
"a postjudgment order awarding or denying a request for a party to pay attorney fees and costs or denying a request for an attorney to pay attorney fees and costs ..."

5) Amend MCR 7.202(7)(A)(iv) by adding:
"An order requiring an attorney to pay attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule shall be construed to be a request for investigation under MCR 9.112(B) and shall be processed accordingly."

Desired results:

The above changes will prevent a lawyer/client conflict of interest from occurring during trial by limiting sanction orders to those necessary to finish the trial effectively. The above changes will prevent a conflict of interest from occurring after trial by bifurcating the lawyer's issues from the case in chief by diverting the lawyer's issues to a disciplinary panel.

The substantial 1985 court rules changes were designed to improve the judicial system by weeding out wasted arguments. The current practice creates a new layer of often-wasted argument. There is no down side to bringing a motion for sanctions. The worst that happens is that the lawyer makes a profit

from bringing a sanction motion that is denied. Since sanctions are sometimes granted for nothing more than winning a motion for summary disposition, the potential for a client's gain far outweighs the client's cost for the motion.

But if the trial court is forced to grieve any lawyer who violates MCR 3.1 or 3.2 or 3.3, trial courts are likely to become much more careful when deciding sanction motions. The suggested changes will encourage courts to make a clear distinction between conduct that advances a client's honest claims and conduct that attempts to win cases by attrition, subversion, diversion and delay. Courts will also establish the casual relationship between conduct and result and to attribute the harm to the responsible party or lawyer. Because future sanction orders will include more and clearer details, the orders will both educate members of the bar and expedite sanction appeals.

As soon as it becomes easy to predict which sanction motions will be granted, frivolous motions for sanctions will decrease because they are ineffective and because they may subject the signer to a motion for sanctions. Motions for sanctions will decrease further because improper conduct will decrease.

Potential Problems the changes may cause:

Courts may decide only to sanction litigants, and not lawyers for "minor" infractions that the lawyers should have prevented. I believe this potential problem will solve itself after the standard of lawyer conduct is better known. Some will argue that there are things which may be construed as a technical violation of MCR 2.114 that do not rise to a level of seriousness that violates the public trust. In that case, the motion should be a motion to correct the nearly innocent mistake under the court's general power to control the litigation. If it is a serious enough violation of law to warrant a motion for sanctions under MCR 2.114, rather than a motion to cure a defect, it is a serious enough violation to pursue.

Until the difference between vigorous advocacy and fraud on the court is well defined – for example, when lawyers no longer try to get away with submitting answers to complaints containing 70% "neither admit nor deny" answers – disciplinary panels may be overworked. If we are not committed to the ideas embedded in the 1985 court rules changes, we should make the court rules conform to the reality. We cannot have a rule that demands pleading signers to perform a reasonable factual investigation if we think lawyers should take their client's word for the facts. If we take the attitude that modern discovery practice removes the need to limit claims and defenses to those that are accurate, genuine and raised in good faith, we should amend the rules to allow the pleadings we accept. But if we believe in the goals that caused us to make the 1985 rules changes, then we should do the work and endure the

difficulties we will incur while we teach each other the "new" standard of civility and fairness.

In the end, the public will not appreciate our being more consistent about how we deal with the problems of a small percentage of the state bar at the same time much of the public still suffers from justice delayed or denied by dishonest lawyer conduct. Today's long docket delays are caused by the very same problems that lead to the 1985 court rule changes. Bank robbery is more serious than signing a civil pleading that denies an allegation a lawyer knows is true. But it is the second sin is the one that causes people to tell lawyer jokes, to distrust lawyers, and to question the validity of the concept of self-governing public servants.

Thank you very much for considering my comments.

Sincerely,

Jon Luker

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